

**United States Department of the Interior
U.S. Fish and Wildlife Service
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AESO/FA

December 01, 2000

Ms. Cindy Lester
Chief, Regulatory Branch
U.S. Army Corps of Engineers
3636 North Central Avenue, Suite 760
Phoenix, Arizona 85012-1936

Dear Ms. Lester:

On November 7, 2000, the Service received the Preliminary In-Lieu Fee Mitigation Proposal At Continental Reserve, Marana, Arizona, dated September 8, 2000. This document was transmitted by CMG Drainage Engineering, Inc. in response to our September 21, 2000, comments on Public Notice 1999-15883-RJD (PN). On November 21, Mr. Mike Martinez of our office contacted Mr. Robert Dummer of your office to inquire on the status of the subject permit application. Mr. Dummer acknowledged our receipt of the mitigation proposal and indicated that comments would be accepted until January, 2001. These comments are provided under the authority of and in accordance with the Fish and Wildlife Coordination Act (48 Stat. 401, as amended U.S.C. 661 et. seq.).

The mitigation plan does not address the totality of project related impacts to jurisdictional waters. Information in the PN indicates that a total of 39.4 acres of jurisdictional waters are present on site. The mitigation proposal provides compensatory mitigation in the form of an in-lieu fee for what it refers to as direct impacts to 4.9 acres of jurisdictional waters. Direct impacts appear to be those resulting from the actual placement of dredge or fill material. The 404(b)(1) Guidelines (CFR 40 part 230.11) provides for the determination of cumulative and secondary effects to jurisdictional waters. Cumulative effects are collective impacts of a number of discharges and secondary effects are those impacts associated with a discharge but do not result from the actual placement of dredge and fill material. Based on the project description in the PN and the scope of the mitigation proposal, these determinations have not been made nor appropriate mitigation provided for the Continental Reserve project.

The impact analyses presented in the PN and mitigation proposal also do not assess the totality of project related impacts on the environment. The mitigation proposal states that to compensate for unavoidable direct impacts to jurisdictional waters, compensatory mitigation in the form of an in-lieu mitigation fee will be provided. The 404(b)(1) Guidelines (40 CFR Part 230.10) state that no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem. If the

proposed discharges are unavoidable, the Corps and applicant must have mutually determined that alternatives resulting in zero discharge are not economically, technically, or logistically capable of being done. Therefore, it follows that the 598.7 acre residential and commercial development is inextricably linked to the discharge of dredge and fill material, could not be constructed but for the issuance of Section 404 permit, and project impact analysis and mitigation should address the entire development. Based on information contained in the PN and the nature of the mitigation proposal the Corps has not evaluated the full impact of issuing this permit.

The impact analyses presented in the PN and mitigation proposal also do not assess effects of the proposed project on the endangered cactus ferruginous pygmy-owl (*Glaucidium brasilianum cactorum*), a species listed pursuant to the Endangered Species Act of 1973, as amended. Our review of the site plan included with the PN reveals that the proposed project would disrupt habitat connectivity, thus hindering the ability of the project area to continue to serve as a movement corridor for the pygmy-owl. During the November 21 phone discussion, Mr. Martinez reiterated to Mr. Dummer that we believe the project may affect the pygmy-owl. Mr. Dummer indicated that the Corps intends to move forward under a determination of no effect. We continue to recommend that a biological assessment should be prepared, pursuant to section 7 of the Endangered Species Act, and be submitted to our office.

Based on these concerns, the Service objects to the issuance of this permit. We thank you for the opportunity to review the mitigation proposal and recommend that you contact Mike Martinez (x224) or Don Metz (x217) to resolve these issues.

Sincerely,

/s/ David L. Harlow
Field Supervisor

cc: Regional Administrator, Environmental Protection Agency, San Francisco, CA
Supervisor, Project Evaluation Programs, Arizona Game and Fish Department, Phoenix, AZ